BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BELINDA E. BIALEK	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,043,332
UNITED PARCEL SERVICE INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL FIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the April 19, 2010, preliminary hearing Order of Administrative Law Judge Steven J. Howard (ALJ). Claimant was awarded medical treatment with Dr. Lynn D. Ketchum as the authorized medical physician.

Claimant appeared by her attorney, Michael H. Stang of Mission, Kansas. Respondent and its insurance carrier appeared by their attorney, Frederick J. Greenbaum of Kansas City, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held April 15, 2010, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer accidental injuries to her right upper extremity which arose out of and in the course of her employment with respondent? Respondent contends claimant's activities working for a florist shop and her preexisting hyperthyroidism are the cause of claimant's right upper extremity symptoms. Claimant contends she

developed the right upper extremity symptoms while working for respondent over a four-year period.

2. If claimant did suffer personal injury by accident which arose out of and in the course of her employment with respondent, what is the date of accident in this matter? Respondent argues the proper date of accident is June 3, 2009, a time when claimant was employed by Michael's Heritage Florist shop.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked for respondent as a tower clerk for several years. This job required that she run a console, push buttons to activate and stop belts, operate a radio, input information into a computer and use the telephone, all on a regular basis. These activities involved primarily claimant's right upper extremity. Approximately four years before claimant's June 3, 2008, termination for attendance problems, claimant began experiencing pain in her right upper extremity, including her right hand, wrist and occasionally the elbow. Claimant had a discussion with Terry Stover, the hub manager, in January 2008 regarding her right upper extremity pain complaints, as well as a hearing loss claim which is not included in this dispute. No accident report was completed at that time, and claimant did not request medical treatment for her right upper extremity. Claimant testified that she was afraid that if she requested medical treatment, it would ultimately lead to her termination. Claimant also testified that she discussed her right upper extremity complaints with other supervisors/managers, including Brad Williams, Kurt Beye and John Jardes. None of the above-named individuals testified in this matter.

On June 3, 2008, claimant's employment with respondent was terminated due to attendance problems not related to this claim. Shortly thereafter, claimant contacted an attorney named Pamela J. Billings. There is discussion in this record of a written claim dated July 22, 2008. But, no such document is contained in this record. Claimant did file a K-WC E-1, Application For Hearing, for the hearing loss on December 5, 2008. A second K-WC E-1 was filed on June 3, 2009, which added the right upper extremity to the claim.

Claimant was also employed during this same time with a local florist. Claimant was primarily a delivery person, driving a van with power steering. Claimant would also help clean the shop, including cleaning flower pots, and would occasionally help sort and prepare flowers. Claimant testified that the activities associated with the florist shop would only occasionally affect her right upper extremity.

Claimant was referred by her present attorney for an evaluation to board certified occupational medicine specialist Michael J. Poppa, D.O., on June 16, 2009. This is the first time claimant was referred for medical treatment or for an evaluation, authorized or otherwise, in this matter. Claimant was diagnosed with overuse strain/tendinitis, medial epicondylitis/cubital tunnel syndrome and extensor tendinitis, all to the right upper extremity. Dr. Poppa determined that claimant's conditions to her right upper extremity were caused or contributed to by her employment with respondent. Conservative treatment was recommended, with the possibility of surgery being discussed in the June 16, 2009, report.

Claimant was referred by respondent to orthopedic surgeon Anne R. Rosenthal, M.D., for an evaluation on February 2, 2010. Claimant complained of symptoms including weakness and loss of feeling in her right hand, pain in her right long finger radiating up her arm, and numbness and tingling in her right long finger through small finger at nighttime. She also complained that she would drop things and felt weak in her right hand. Dr. Rosenthal diagnosed claimant with possible right carpal tunnel syndrome and recommended an EMG/NCV of the right upper extremity as well as splinting or possible surgery. Claimant's symptoms were determined to be unrelated to her employment with respondent. Instead, Dr. Rosenthal opined that claimant's symptoms were the result of her preexisting hyperthyroidism and her employment with the florist shop.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

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[1] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2008 Supp. 44-501(a).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

This Board Member will first determine whether claimant suffered an accidental injury which arose out of and in the course of her employment with respondent. The only person to testify in this matter is claimant. Claimant's description of her upper extremity symptoms and their onset, given both during her discovery deposition (a copy of which was admitted as Respondent's Exhibit B to the preliminary hearing) and during the preliminary hearing itself, remained consistent. Her symptoms began approximately four years before her last day of work (which was June 3, 3008) and gradually worsened over time. Her description of her symptoms to the examining physicians and the activities causing those symptoms is consistent with her testimony.

It comes as no surprise that claimant's medical expert, Dr. Poppa, determined that claimant's symptoms stem from her employment with respondent, while respondent's expert, Dr. Rosenthal, determined that claimant's upper extremity physical complaints stem from her preexisting hyperthyroidism and her employment with the florist shop.

> A claimant's testimony alone is sufficient evidence of his own physical condition.[5]

Here, the issue is determined in claimant's favor due to her consistent description of the development of these conditions, both during her testimony and with her consistent descriptions to the examining physicians. Claimant has regularly described the development of the symptoms while working for respondent. She discussed the problems with her supervisors on several occasions, and her descriptions are uncontradicted as none of the supervisors testified in this matter.

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[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[5] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.[6]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[7]

This Board Member finds that claimant has satisfied her burden of proving that she suffered personal injury by accident which arose out of and in the course of her employment with respondent. While there may have been some involvement with her preexisting hyperthyroidism and her job with the florist, neither of these is significant to deprive claimant of her entitlement to benefits under the Kansas Workers Compensation Act. The award of benefits is affirmed.

Date of accident is not an issue that the Board has jurisdiction to decide on an appeal from a preliminary hearing order unless a finding is necessary in order to determine whether claimant suffered accidental injury arising out of and in the course of employment, or if notice and/or written claim was timely made.[8]

While the Board normally does not take jurisdiction of the issue dealing with the date of accident on appeal from a preliminary hearing, respondent did raise the issue of timely notice at the time of the preliminary hearing. As such, and out of an abundance of caution, this Board Member will discuss the proper date of accident in this matter.

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident

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[6] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

[7] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[8] *Cluck v. Atchison Casting Corp.*, Nos. 204,983 & 265,534, 2002 WL 31602542 (Kan. WCAB Oct. 24, 2002).

> be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[9]

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[10]

In this instance, claimant was neither taken off work nor restricted by an authorized physician from performing her work for respondent. Therefore, the proper date of accident under K.S.A. 2008 Supp. 44-508(d) is either the date claimant gave written notice of the injury to respondent or the date the condition was diagnosed as work related and communicated in writing to the claimant. Here, claimant provided written notice to respondent on June 3, 2009, of the claimed injuries to her right upper extremity. This becomes the date of accident for the purposes of this litigation and also satisfies the notice requirements of K.S.A. 44-520. Therefore, the question regarding any ongoing dispute as to the proper date of accident and whether notice was timely given is answered.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied her burden of proving that she suffered a series of accidental injuries which arose out of and in the course of her employment with respondent, with a date of accident determined to be June 3, 2009. The award of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Steven J. Howard dated April 19, 2010, should be, and is hereby, affirmed.

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[9] K.S.A. 2008 Supp. 44-508(d).

[10] K.S.A. 44-520.

[11] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of June, 2010.

HONORABLE GARY M. KORTE

c: Michael H. Stang, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge